Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment:	)	
Expanding the Reach and Reducing the Cost of	)	WC Docket No. 11-59
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	

COMMENTS OF CENTURYLINK

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July 18, 2011

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I. INTRODUCTION AND SUMMARY

In its April 7, 2011 Notice of Inquiry (*NOI*), the Federal Communications Commission (Commission or FCC) continues its work on implementing the crucial tasks identified in the National Broadband Plan[1] and furthering its Broadband Acceleration Initiative. The *NOI* identifies six broad categories of issues concerning access to the public rights-of-way (PROW) for installation of broadband infrastructure, and it asks commenters "to describe the specific kinds of public rights of way and wireless facilities siting issues that exist in each of these areas."[2] The *NOI* also identifies and requests comments on proposed solutions.[3]

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[1] *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 26 FCC Rcd 5384 (2011); OMNIBUS BROADBAND INITIATIVE, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010).

[2] *NOI*, 26 FCC Rcd at 5389 ¶ 12, 5390-95 ¶¶ 13-33. These categories include: (1) timeliness and ease of the permitting process; (2) the reasonableness of charges; (3) the extent to which ordinances or statutes have been updated to reflect current communications technologies or innovative deployment practices; (4) consistent or discriminatory/differential treatment; (5) presence or absence of uniformity due to inconsistent or varying practices and rates in different jurisdictions or areas; and (6) other rights of way concerns including "third tier" regulation or requirements that cover matters not directly related to rights of way use or wireless facilities siting. *Id.*

CenturyLink, through its predecessor companies, has been a strong advocate of PROW policy reform in its comments leading to adoption of the National Broadband Plan.[4] CenturyLink is thus appreciative for the *NOI*. As set forth in its prior comments and discussed further below, CenturyLink has experienced too many instances in which local governments have imposed excessive, discriminatory, and/or unfair and unbalanced fees and other terms of access for use of the PROW that have little or no relationship to the actual cost of managing the PROW. For many local governments, these "revenue-generating" fees have been a historical source of indirect taxation. These fees have diverted and continue to divert funds from the deployment of broadband infrastructure. But more so today, with the advent of myriad forms of competition from providers not directly using the PROW, these revenue-generating fees create an unlevel playing field where incumbent carriers and their customers are subsidizing governmental programs having nothing to do with the PROW, while many competitors and their customers are not being required to do so.

Section 253 of the Communications Act, 47 U.S.C. § 253, was specifically designed to impose limits on these local regulations. As the Commission recognized, Section 253 "prohibits state and local policies that impede the provision of telecommunications services while allowing for rights-of-way management practices that are nondiscriminatory, competitively neutral, fair and reasonable."[5] Specifically, Section 253(a) preempts requirements that "may prohibit or have the effect of prohibiting" the provision of telecommunications services, while Section 253(c) saves requirements setting "fair and reasonable compensation...on a competitively neutral and

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[3] *NOI*, 26 FCC Rcd at 5395-98 ¶¶ 34-50.

[4] *See* Comments of Qwest Communications International, Inc., *In the Matter of a National Broadband Plan for Our Future*, GN Docket No. 09-51 (June 8, 2009), pp. 26-33. CenturyLink acquired Qwest Communications International Inc., effective April 1, 2011.

[5] National Broadband Plan, p. 113, Recommendation 6.6 (citation omitted).

nondiscriminatory basis…." The intent in enacting Section 253 was to balance the national goals of fostering competition and encouraging deployment of advanced services with the historical local management interests over the PROW, including the collection of fair and reasonable fees.[6]

Unfortunately, Section 253 has been inconsistently applied. Courts in early cases adopted the Commission's flexible *California Payphone* definition of "effect of prohibiting" under Section 253(a) as a requirement that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment[.]"[7] Adoption of this standard led to several courts holding that revenue-generating PROW ordinances were prohibitive under Section 253(a), and it provided a degree of certainty as to how Section 253 would be interpreted. This, in turn, led to a higher level of cooperation with local governments in negotiating PROW fees and other terms. Recent decisions by the Eighth and Ninth Circuit Courts of Appeals, however, have paid lip-service to the *California Payphone* standard while applying a near-impossible "actual prohibition" standard before holding a PROW fee or term to be unlawful. The results are the loss of Section 253 as a meaningful check on unreasonable PROW fees in the states within these circuits, the creation of uncertainty in states outside of these circuits, and the creation of less-productive negotiations with local governments.

Based on the inconsistency in the case law, the Commission's logical first step – before implementing any type of voluntary mediation or best practices programs – is to use its rulemaking authority to implement and clarify Section 253. Following due notice and opportunity for comment, the Commission should codify its *California Payphone* standard that a

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[6] *See, e.g., Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006).

[7] *In re California Payphone Ass'n*, 12 FCC Rcd 14191, 14210 ¶ 42 (1997).

local regulation is effectively prohibitive under Section 253(a) if it "materially limits or inhibits the ability of a provider to compete in a fair and balanced legal and regulatory environment." Adoption of this rule should prevent other circuits from following the Eighth and Ninth Circuits' actual prohibition standard and hopefully force lower courts within those circuits to reconsider the validity of these recent decisions. Adoption of this rule will also lead to greater certainty as to each party's legal rights and limits in negotiations and thus potentially lead to more mutually-agreeable solutions.

At the same time, the Commission should adopt a rule specifying that charges for use of the PROW are "unreasonable" under Section 253(c) to the extent they exceed the costs incurred by the local government in managing and maintaining the PROW. As the Commission notes in its *NOI,* there has been disagreement among carriers and local governments as to whether it is reasonable to allow governments to assess a "market value" rate as part of its PROW fee calculations. The Commission should issue a rule that sets a presumptively valid PROW fee level at no more than the local government's proven costs for managing and maintaining the PROW.

With the adoption of these two rules, CenturyLink believes that the Commission can return the certainty and vitality that Congress intended Section 253 to have, facilitate PROW negotiations between carriers and local governments, and stimulate deployment of broadband services. Clarification of the law, more than anything, will assist in accomplishing these goals.

II. CENTURYLINK'S EXPERIENCES REGARDING UNREASONABLE, DISCRIMINATORY, AND COMPETIVELY UNFAIR PROW CHARGES.

A. The Reasonableness of Charges.

Like most national carriers, CenturyLink is subject to varying types of fees for PROW use depending on the state and locale. Some local governments have recognized that communications and broadband services are beneficial and crucial for economic development, and they thus have allowed carriers to occupy the PROW in return for one-time permit charges or similar fees that are limited to recovering the cost of PROW management and maintenance.[8]

Other local governments, however, have seen the opportunity for a large and continuous revenue source, and they have used their monopoly control over the PROW to extract large fees that are used to subsidize other government services. For example, the Texas Municipal League reports that "right-of-way rental fees constitute nearly ten percent of many Texas cities' general revenues…."[9] These "revenue-generating" fees often are established as annual fees, typically either tied to the total linear feet of PROW occupancy or set as a percentage of a carrier's gross revenue. Whether tied to revenue or linear feet, these annual fees rarely (if ever) are closely aligned to the maintenance costs associated with the carrier's facilities. These fees fail to take into account the presence of other carriers in adjacent space, the length of time occupied in the PROW, the location of the PROW, the aerial or underground nature of the PROW used, the characteristics of the PROW including the condition of the pavement, and the relative costs for PROW management and maintenance caused by other carriers and utilities such as gas, electric, cable, water, and sewer. Indeed, the burden to the PROW imposed by broadband providers providing service through eight inch conduit is unquestionably light relative to the much larger facilities for electric, gas, sewer, and water services. Yet fees are often identical.

[8] Although they keep PROW fees at or close to costs, some of these local governments impose taxes on telecommunications services, often termed "license taxes," including local governments in states such as Florida, Illinois, and Utah. Although these taxes generally are imposed on the consumer and billed by the carriers, they can have a negative impact on broadband deployment by increasing the overall price of the service and thus deterring consumers from ordering or upgrading services, which in turn negatively impacts deployment. If properly implemented, however, these taxes are preferable to revenue-generating PROW fees to the extent they are applied in a nondiscriminatory and competitively neutral manner across technologies.

[9] *See* http://www.tml.org/leg_updates/legis_update040610c_rightofway.asp (last visited July 17, 2011).

CenturyLink's experience with revenue-generating fees versus cost-based fees is mixed. In states such as Colorado, Washington, Arizona, Iowa, and Minnesota, cities are limited by state law to charging PROW fees for costs reasonably incurred in maintaining the PROW and issuing permits.[10] Issues in these states generally involve whether permit fee schedules are sufficiently related to actual costs. Although disagreements often arise as to permissible costs to include in the fee schedules, the schedules normally are finalized without litigation.[11] The cost-based fees in these states allow for streamlined permitting and ready deployment of infrastructure.

Cities elsewhere, however, often lack such state control. In Oregon - where cities have significant home rule powers - state law allows cities to impose revenue-based franchise fees, although it limits the assessment of franchise fees for use of the PROW to 7% of local exchange revenue.[12] CenturyLink was recently forced to sue the City of North Plains for exceeding this state cap, which resulted in the repeal of the offending ordinance.[13] This result came, however, only after the expenditure of substantial attorneys' fees. Moreover, based on the Ninth Circuit's abandonment of the *California Payphone* standard, discussed below, any legal challenge to the standard 7% franchise fee in any city would be difficult, so long as CenturyLink were still able to provide services and pay these fees.

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[10] Iowa Code § 480A.3; A.R.S. §§ 9-582 and 9-583; Minn. Stat. § 237.163; Wash. Rev. Code § 35.21.860(1) (2002); C.R.S. § 38-5.5-107(1)(b).

[11] For instance, the Colorado Court of Appeals in 2009 confirmed that Colorado law did not allow cities to include charges for alleged future pavement degradation costs (to the extent such costs could be proven) in the PROW fee schedules. *Plains Cooperative Telephone Association, Inc. v Board of County Commissioners of Washington County*, 226 P.3d 1189 (Colo. App. 2009). CenturyLink filed an *amicus curiae* brief in this proceeding.

[12] O.R.S. § 221.515.

[13] *Qwest Corp. v. City of North Plains, OR*, Case No. C074211CV, Washington County, OR Circuit Ct. The city had attempted to impose an additional 5% gross revenue "privilege tax" on telecommunications services, which it admitted was for use of the PROW. The city rescinded the ordinance to settle the lawsuit.

In New Mexico – where cities impose franchise fees but have far less home rule powers – CenturyLink was successful for some time in negotiating franchise fees. Although these franchise fees were based on a percentage of gross revenue (which by definition are not closely tied to any true PROW cost measure), these fees traditionally were limited to local service revenue and at percentages ranging from 2% to 4%. Recently, however, New Mexico cities have become more aggressive by demanding increases in both the percentages assessed and the base of revenue to which it applies. In fact, CenturyLink recently initiated a preliminary injunction proceeding against the City of Santa Fe for its attempt to include substantial new sources of revenue in the new franchise base.[14] As a result of the preliminary proceeding, the City amended its ordinance to exclude certain revenue from its franchise base, but it nevertheless maintained the ordinance's expansion of the revenue base to include new services such as wholesale, intrastate, and interstate services. Many of these services are provided with little or no use of the PROW within the City of Santa Fe, yet the City insists that the associated revenue be included within the new franchise base. To make matters worse, CenturyLink in many cases does not track wholesale revenue at a city-specific level, as it generally does not pay city sales tax on wholesale services. Consequently, inclusion of these services in the new franchise base could cause expensive system upgrades and deter future deployment of advanced services. The City's refusal to exclude this revenue from the new franchise base has required CenturyLink to maintain its litigation.

In addition to excessive franchise fees, CenturyLink has experienced excessive annual linear foot fees, which are often charged to IXCs or transiting carriers. In 2007, CenturyLink was forced to file a lawsuit against the Maryland National-Capital Park & Planning Commission

[14] *Qwest Corp. v. City of Santa Fe*, Case No. 10cv00617, U.S.D.C., Dist. NM (2010).

(MNCPPC) over its threat to evict CenturyLink if it did not agree to an increase in its annual linear foot rate from \$4.20 to \$26.00.[15] This was a classic case of bait-and-switch where the MNCPPC had set a lower initial rate to encourage carriers to install facilities, which it then massively raised once the facilities were in place and the costs had been sunk. Other carriers within the particular PROW nevertheless made the decision during the lawsuit to abandon their assets and create a new joint trench around the jurisdiction at a shared cost of over \$1 million. Forced to risk losing this opportunity, CenturyLink relocated its facilities and incurred over \$400,000 in relocation costs. At trial, the federal court ultimately concluded that the \$26.00 demand was preempted under Section 253, but the relief came too late as CenturyLink had already incurred the build-around costs and left the PROW. CenturyLink has similarly received demands from other jurisdictions for annual payments ranging from \$5.00 to \$10.00/foot for use of certain PROW, which far and exceeds the management costs.

CenturyLink also has been subject to excessive one-time permit fees. In 2006, CenturyLink was forced to file a complaint in federal court against a New Mexico irrigation district to challenge a 2,400% increase in costs, including a charge of \$3,000 for each service drop that crossed more than 50 feet of the district's property.[16] CenturyLink ultimately settled that case on a compromised rate, but only after the expenditure of attorneys' fees. CenturyLink similarly is in litigation along with Comcast and other utilities against Santa Fe County concerning a permit fee increase of over 600 percent, including a \$2,500 fee for inspecting the

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[15] *Qwest Comm'ns Corp. v. Maryland National-Capital Park & Planning Comm'n,* Case No. 07cv02199, U.S.D.C, Dist. MD.

[16] *Qwest Corporation v. Elephant Butte Irrigation District,* Case No. 07-cv-00163, U.S.D.C., Dist. NM.

installation of overhead cable.[17] CenturyLink expects this litigation to result in a compromised fee schedule, but once again this compromise will come only after the expenditure of attorneys' fees that could have been put toward investment.

Whether in the form of annual revenue-based fees, annual linear foot fees, or excessive one-time permit fees, excessive PROW fees directly inhibit deployment of broadband. The annual linear foot fees and the one-time permit fees are costs that are incurred by most carriers' network operations units, including CenturyLink's. These costs generally cannot be passed through to individual customers. And, like most carriers, CenturyLink must budget for annual expected PROW costs and other network-related costs before it can plan for development and upgrades of broadband facilities. The more expenses these carriers must incur for maintaining existing plant within the PROW, the less funds that are available for deployment. The annual revenue-based fees also directly inhibit broadband build-out to the extent that they cannot be passed through, which is the case in some jurisdictions and in some cases where the associated revenue cannot be tracked on a city-specific and customer-specific level. Moreover, as discussed below, even the fees that are passed through will inhibit broadband deployment, as these inflated charges provide customers with one more reason to abandon landline service in favor of no broadband service or service provided by other means.

B. Consistent or Discriminatory/Differential Treatment.

Just as CenturyLink has experienced excessive PROW fees when measured in absolute terms, CenturyLink also has experienced many instances of discriminatory treatment. In 2005, CenturyLink was forced to file a lawsuit against the City of New York when it threatened to evict CenturyLink for refusing to make a 5% franchise fee under circumstances where the

[17] *New Mexico Gas Co. et. al. v. Board of County Comm'nrs of County of Santa Fe*, Case No. D-0101-CV-2009-02050, Santa Fe County Dist. Ct.

incumbent enjoyed a perpetual grant of use.[18] Following a favorable pretrial ruling, CenturyLink settled with the City for a limited annual payment, but the settlement period has expired and the City has again demanded annual payments even as the incumbent continues free use. Similarly, the City in the Santa Fe litigation referenced above is seeking over $6 million in alleged past due franchise fees (which were not in fact due) for periods in which other carriers occupied the PROW without charge.

The discriminatory nature of the revenue-generating fees is even more pronounced when considered in relation to competitors not directly using the PROW. Many providers of wireless broadband services contract with the incumbents for backhaul services and have no direct relation with governments managing the PROW.[19] Accordingly, these wireless providers escape PROW charges, except to the extent that the incumbent might be able to pass through these charges. In the case of percentage of revenue methodologies, however, the associated fees for these backhaul services are difficult to identify on a city-specific level, much less pass through. Moreover, to the extent that the revenue can be tracked, many wireless providers and other wholesale customers argue that such fees cannot be passed through to them by contract and/or tariff. In those situations, CenturyLink is not only responsible for paying revenue-generating fees for providing its own services, but also for paying such fees for the services of its broadband competitors. In a competitive market, any revenue-generating input creates a competitive imbalance to the extent that it is not uniformly applied.[20] As the Second Circuit recognized in

[18] *Qwest Comm'ns Corp. v. City of New York*, 387 F. Supp. 2d 191, 194 (E.D.N.Y. 2005).

[19] To the extent these carriers install wireless facilities, they often install towers and other equipment on private property, where they can negotiate between several private landowners for a competitive rate. Landline carriers such as CenturyLink do not have the luxury of avoiding the PROW.

[20] *See, e.g.,* James B. Speta, *Competitive Neutrality in Rights of Way Regulation: A Case Study in the Consequences of Convergence*, 35 CONN. L. REV. 763, 768 (2003). ("Although competitive

TCG New York, Inc. v. City of White Plains,[21] "fees that exempt one competitor are inherently not 'competitively neutral,' regardless of how that competitor uses its resulting market advantage."

III. SECTION 253 HAS BEEN INCONSISTENTLY APPLIED.

In *California Payphone*, the Commission examined a local ordinance that prevented payphone providers from installing outdoor payphones on private property in a particular area, while permitting the installation of payphones indoors on private property and outdoors on public rights-of-way.[22] The Commission established the test for "effective prohibition" under Section 253(a) by stating that a local regulation effectively prohibits the provision of a telecommunication service if it "*materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment*."[23] The Commission concluded that, in light of the options available to payphone providers in the area in question and the absence of proof that these other options were less economical, the ordinance did not prohibit payphone providers from providing service in the area.[24] The Commission soon

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neutrality might seem to be satisfied so long as every carrier using any right of way were charged on the same schedule, such a limited notion ignores the presence of wireless carriers in the market. Wireless carriers do not use rights of way to provide service, but Congress expected as part of its general expectation of 'convergence' that wireless carriers would begin to compete with wireline carriers for the provision of identical services. Competitive neutrality can be maintained between wireline and wireless carriers only if right of way charges to wireline carriers reflect the costs of right of way use. If wireline carriers are charged a price for right of way use that is in excess of cost, wireline service will be at an artificial cost disadvantage and wireless services will receive an implicit subsidy, resulting in inefficient demand for wireless services—and inefficient supply of them as well [footnotes omitted].")

[21] 305 F.3d 67, 80 (2d. Cir. 2002), *cert. denied*, 538 U.S. 923 (2003).

[22] 12 FCC Rcd at 14205 ¶ 28.

[23] *Id.* at 14206 ¶ 31 (emphasis added).

[24] *Id.* and at 14208-10 ¶¶ 37-42, 14211-12 ¶ 45.

reiterated this standard in *In re Public Utility Commission of Texas*,[25] and *TCI Cablevision of Oakland County, Inc.*,[26] in circumstances where it considered each of the legal requirements at issue to be unlawful.

Following *California Payphone*, federal courts were appropriately clear that a regulation "need not erect an absolute barrier to entry in order to be found prohibitive."[27] Courts thus initially preempted a broad array of revenue-generating franchise fees and other excessive PROW charges on telecommunications carriers.[28] Throughout these decisions, courts had little

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[25] 13 FCC Rcd 3460, 3470 ¶ 22 (1997) (preempting a state law requiring new entrants to rely at least in part on facilities not owned by the incumbent).

[26] 12 FCC Rcd 21396, 21441 ¶ 105 (1997) (opining various provisions to likely be preempted, including "provisions that . . . require franchisees to interconnect with other telecommunications systems in the City for the purpose of facilitating universal service, provide for regulation[] of the fees charged for interconnection, and mandate 'most favored nation' treatment for the City under which a franchisee providing a 'new service, facility, equipment, fee or grant to any other community . . . within the State . . .' shall provide the same to the [footnote omitted]" city granting the franchise).

[27] *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (citation omitted) (10th Cir. 2004); *see also*, *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268-69 (10th Cir. 2000) (the challenged regulation need not be "insurmountable" to be preempted); *Municipality of Guayanilla*, 450 F.3d at 18 (quoting *City of White Plains*); *City of White Plains*, 305 F.3d at 76.

[28] *See, e.g., AT&T Communications of the Southwest, Inc. v. City of Dallas,* 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998) (preempting 4% gross revenue fee); *Bell Atlantic-Maryland, Inc. v. Prince George's County, Md.*, 49 F. Supp. 2d 805, 817 (D. Md. 1999) (preempting 3% gross revenue fee), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000); *N.J. Payphone Ass'n, Inc. v. Town of W. N.Y.*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff'd*, 299 F.3d 235 (3d Cir. 2002) (preempting fee based on highest bids submitted for exclusive PROW use); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002) ("[The] fees charged under the franchise agreements are not based on the costs of maintaining the right of way, as required under [Section 253] [footnote omitted]."); *Qwest Comm'ns Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1100 (N.D. Cal. 2001) ("Fees charged against telecommunications carriers must be directly related to the carrier's actual use of the local rights-of-way [citation omitted]."); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003) (preempting a 5% gross revenue requirement on new entrants); *XO Missouri, Inc. v. City of Maryland Heights,* 256 F. Supp. 2d 987, 994-95 (E.D. Mo. 2003) (preempting 5% gross revenue fee); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) (preempting a revenue-generating appraisal/lease fee structure); *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006) (preempting a 5% fee on

trouble understanding and applying the flexible definition of "effective prohibition" established in *California Payphone.*

That all ended, however, in decisions issued in short succession by the Eighth and Ninth Circuits. In *Level 3 Comms., LLC v. City of St. Louis,*[29] the Eighth Circuit rejected a challenge to linear foot charges for use of the PROW. Refusing to even consider whether the charges were fair and reasonable under Section 253(c), the court held that the carrier lacked authority to challenge the fees under Section 253(a). The Eighth Circuit acknowledged that the proper test for determining an effective prohibition had been set forth in *California Payphone*. Refusing to actually apply the standard, however, the Eighth Circuit noted that the carrier had admitted that it "cannot state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way."[30] Rather than determining whether the carrier nevertheless was materially limited or inhibited from competing in a fair and balanced environment, the Eighth Circuit simply concluded that "[t]his admission establishes that [the carrier] has not carried its burden of proof on the record we have before us."[31]

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gross revenues). To be sure, not every court during this time frame held every challenged PROW fee or term preempted by Section 253. In a widely-criticized decision, the Sixth Circuit held a discriminatory 4% gross revenue fee to be saved under Section 253(c) absent proof of adverse economic impact. *TCG Detroit v. City of Dearborn,* 206 F.3d 618 (6th Cir.), *reh'g denied* (*en banc*), 2000 U.S. App. LEXIS 8826 (6th Cir. May 1, 2000). *See also City of Portland, OR v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1073-75 (D. Ore. 2005) (upholding 5% gross revenue fee under Section 253). But the majority of courts held revenue-generating fees to be preempted, and there was relative clarity in the standard.

[29] 477 F.3d 528 (8th Cir. 2007), *cert. denied*, 129 S. Ct. 2859, 174 L. Ed. 2d 576 (2009).

[30] *Id.* at 533.

[31] *Id.* at 533-34.

The Ninth Circuit issued its similar ruling in *Sprint Telephony PCS, L.P. v. County of San Diego*.[32] In that case, the full panel of the Ninth Circuit reversed decisions by the district court and appellate panel that had held that an ordinance placing various requirements on the placement, camouflage, and maintenance of wireless transmission towers were preempted by Section 253. Like the Eighth Circuit, the Ninth Circuit acknowledged that *California Payphone* set forth the proper Section 253(a) standard.[33] Like the Eighth Circuit, the Ninth Circuit then refused to apply *California Payphone* and failed to analyze whether the ordinance at issue materially inhibited or limited the ability of the carrier to compete in a fair and balanced legal and regulatory environment. The court instead simply held that, although the ordinance heavily regulated placement and design of wireless towers, it did not specifically "prohibit[] the construction of sufficient facilities to provide wireless services to the County of San Diego."[34] Because there was not an *actual prohibition* on the construction of sufficient facilities to provide services in the county, the Ninth Circuit held that the ordinance was not effectively prohibitive under Section 253(a).

The Federal Government properly criticized these two decisions when the Supreme Court requested it to file an *amicus curiae* brief to address the *certiorari* petitions filed in these cases.[35] The Government reiterated that *California Payphone* set forth the proper application of Section 253(a),[36] and it stated that the standard had become the consensus test by the appellate courts.[37]

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[32] *County of San Diego*, 543 F.3d 571 (9th Cir. 2008), *cert denied*, 129 S.Ct. 2860, 174 L. Ed. 2d 576 (2009).

[33] *Id.* at 578.

[34] *Id.* at 579-80.

[35] *See Level 3 Comm'ns, LLC v. City of St. Louis*, and *Sprint Telephony PCS v. San Diego County*, U.S. Sup. Ct. Docket Nos. 08-626 and 08-759, *Brief for the United States As Amicus Curiae (St. Louis Amicus Brief)*.

[36] *Id.* at 9.

The Government then acknowledged that "aspects of the Eighth and Ninth Circuits' opinions might be read to suggest an unduly narrow understanding of Section 253(a)'s preemptive scope...."[38] The Government noted that the Eighth Circuit in *City of St. Louis* "appears to have accorded inordinate significance to [the carrier's] inability to 'state with specificity what additional services it might have provided' if it were not required to pay [the local] license fee."[39] The Government stated, "[t]hat specific failure of proof – which the court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in [the carrier's] case – is not central to a proper Section 253(a) inquiry."[40] With respect to *County of San Diego*, the Government noted that "[p]ortions of the Ninth Circuit's decision...could be read to suggest that a Section 253 plaintiff must show effective preclusion – rather than simply material interference – in order to prevail."[41] The Government said that this was plainly improper because "limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition that Section 253 was intended to promote."[42]

While clear in its criticisms, the Government nevertheless advocated that the Supreme Court not review these decisions.[43] The Government based its recommendation on the fact that each of the courts had cited *California Payphone* as the controlling standard, even though they

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[37] *Id.* ("The courts of appeals uniformly recognize that the FCC's *California Payphone Order*...prescribes the applicable standard for determining whether a legal requirement has the effect of prohibiting the ability to provide a telecommunications service.")

[38] *Id.* at 8.

[39] *Id.* at 13 (quoting *City of St. Louis*, 477 F.3d at 533).

[40] *Id.*

[41] *Id.* at 14.

[42] *Id.*

[43] *Id.* at 17-18.

had not properly applied it.[44] The Government said that because the circuits purportedly agreed on the legal standard to be applied, the Commission could address any lack of uniformity caused by disagreements among the circuits in application of *California Payphone* by issuing authoritative rulings, which the Government said would govern the disposition of Section 253(a) claims brought in federal court.[45]

To CenturyLink's knowledge, the Commission since has received one petition requesting relief under Section 253.[46] That 2009 petition has instigated scores of supporting and opposing comments, and it has raised complicated issues concerning the scope of the Commission's jurisdiction to hear complaint cases under Section 253(d), particularly in the face of concomitant court proceedings. As that petition awaits decision, the ramifications of *County of San Diego* and *City of St. Louis* continue to be felt. Indeed, the Ninth Circuit applied the new *County of San Diego* standard to mean that the mere fact that a provider continues to operate in a locality is conclusive evidence that any state or local regulation, however draconian, survives review under Section 253(a).[47]

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[44] *Id.* at 18.

[45] *Id.* (citing *National Cable & Telecomm'ns Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005)).

[46] *In the Matter of Level 3 Comm'ns, LLC Petition for Declaratory Ruling that Certain Rights-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted under Section 253*, WC Docket No. 09-153, filed July 23, 2009.

[47] *See Time Warner Telecom v. City of Portland*, 322 Fed. Appx. 496, 498, 2009 WL 965816 (9th Cir. 2009) (rejecting challenge to certain in-kind requirements imposed by city because the requirements "do not have the effect of prohibiting the provision of telecommunications services, as demonstrated by [the carrier's] continued operation") (emphasis added) (citing *County of San Diego*, 543 F.3d at 578)).

IV. THE COMMISSION SHOULD INITIATE A RULEMAKING TO BRING CLARITY TO SECTION 253(a) AND SECTION 253(c).

A. The Commission Should Adopt A Rule Affirming Its *California Payphone* Standard Under Section 253(a).

To resolve the conflict in the case law and confusion in the industry, the Commission should adopt a rule affirming its *California Payphone* standard as being the applicable standard under Section 253(a). The Commission specifically should adopt a rule that a local regulation is effectively prohibitive under Section 253(a) if it "materially limits or inhibits the ability of a provider to compete in a fair and balanced legal and regulatory environment."

Indeed, it cannot even be seriously debated that the Eighth and Ninth Circuits' decisions were far too narrow based on Commission precedent. The Commission has held Section 253(a) to not only preempt regulations that "materially inhibit or limit" carriers under *California Payphone*, but also regulations that might "adversely affect [carriers],"[48] "give customers a strong incentive to choose service from [incumbents] rather than competitors,"[49] and/or "greatly increase the scale of operations required of new entrants."[50] In fact, the Commission heavily implied in another of its *amicus briefs* that, although the question had not arisen in a matter before it, revenue-generating fees likely would be prohibitive under Section 253.[51] Even in the

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[48] *In the Matter of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21700 ¶ 3 (1999).

[49] *In the Matter of Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231 ¶ 8 (2000).

[50] *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8847 ¶ 129 (1997).

[51] Brief of the FCC and United States as *Amici Curiae*, *TCG New York, Inc. v. City of White Plains*, Nos. 01-7213, 01-7255, p. 14, n.7 (2d Cir. filed June 13, 2001) (*TCG Amici Brief*).

National Broadband Plan, the Commission stated that Section 253(a) prohibits state and local policies that "impede" the provision of telecommunications services.[52] These flexible concepts of an "effective prohibition" were found nowhere within the Eighth and Ninth Circuit decisions, and they likely will not be implemented by courts in those circuits in the future without clarification from the Commission.

B. The Commission Should Adopt A Rule Stating That Non-Cost-Based Fees Are Unreasonable Under Section 253(c).

The Commission should also adopt a rule that states that charges for use of the PROW are "unreasonable" under Section 253(c) to the extent that they exceed the costs incurred by the local government in managing and maintaining the PROW. As the Second Circuit recognized in *City of White Plains*, "Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns. Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates."[53]

There has been disagreement among carriers and local governments as to whether it is reasonable to allow governments to assess a "market value" rate as part of its PROW fee calculations. The Commission is appropriately skeptical that a true "market-based" rate could be determined "when, in many situations, there does not appear to be a competitive market for public rights of way…"[54] A competitive market is generally defined as a market in which no single entity or combination of entities can exert undue market power to control prices or the

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[52] National Broadband Plan, p. 113, Recommendation 6.6.

[53] *City of White Plains*, 305 F.3d at 79.

[54] *NOI*, 26 FCC Rcd at 5391 ¶ 16.

values of assets.[55] In competitive markets, participating firms discipline each others' behaviors through the forces of supply and demand, and prices are driven toward the efficient firms' costs.[56] Scarcity is at the foundation of fair economic value in competitive markets. An asset is scarce if at a price of zero the demand for the asset exceeds the supply.[57] When a scarce resource is devoted to one use, there is less of this resource available for other uses.[58] Where a resource is not scarce, regulation is required to set a competitive price.[59]

Applying the principles of competitive markets to the PROW, it would only be appropriate for local government to assess a market rental value on a carrier if the PROW exhibits economic scarcity and the local government incurs a corresponding positive opportunity cost when a firm occupies space in the PROW. That is, if the local government could demonstrate that there were others that would access the space upon utility poles or under streets but for the presence of the particular carrier, then it would be permissible to assess market value rent. However, absent such a demand (and in CenturyLink's experience, cities rarely lack room on poles and under streets), any market value element would be based not on competition but on the city's monopolistic power.

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[55] Hal R. Varian, *Intermediate Microeconomics A Modern Approach*, W.W. Norton & Company, Inc., New York, New York, Fourth edition, 1996, p. 284.

[56] *Id.* at pp. 391-92.

[57] *Id.*

[58] Paul A. Samuelson and William D. Nordhaus, *Microeconomics*, McGraw Hill, Sixteenth Edition, 1998, pp. 14-15, 91; Varian, *Intermediate Microeconomics, supra*, at pp. 23, 318, 393.

[59] As the Commission observed in reference to setting prices for unbundled network elements under Section 251 of the Act: "Adopting a pricing methodology based on forward-looking economic costs best replicates, to the extent possible, the conditions of a competitive market." First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* First Report and Order, 11 FCC Rcd 15499, 15846-47 ¶ 679 (1996) (subsequent history omitted).

Accordingly, the Commission should issue a rule that sets a presumptively valid PROW fee level at no more than the local government's proven costs for managing and maintaining the PROW.

V. CONCLUSION

CenturyLink appreciates the opportunity to have provided these comments and looks forward to working with the Commission in a rulemaking or further proceeding designed to bring clarity to Section 253, streamline the process of obtaining PROW access, and efficiently deploy broadband infrastructure.

Respectfully submitted,

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July 18, 2011